

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION #56

Issue: Is the Municipal Judge of Warrensburg, Missouri a judge within the meaning of Article V, Section 20 of the Constitution of the State of Missouri relating to the prohibition against receiving additional compensation for any public service?

Discussion: The case of In Re: Fullwood, 518 S.W.2d 22, 24 (Mo. 1975) held that the Municipal Courts were courts within the meaning of the Missouri Constitution Articles and as such were subject to disciplinary procedures of the Commission on Retirement, Removal and Discipline (Article V, Section 27). Additionally, Chapter 7 of the Warrensburg Municipal Code states: "the judge of the city's Municipal Court shall be known as a Municipal Judge of the 17th Judicial Circuit Court . . ." (Section 7-3). Further, the Warrensburg Code acknowledges the authority of the Commission on Retirement, Removal and Discipline as follows: "the Municipal Judge shall be considered holding a part-time position, and as such may accept (within the requirements of the Code of Judicial Conduct, Missouri Supreme Court Rule 2) other employment." (Section 7-6).

Article V, Section 20 states: "No judge shall receive any other or additional compensation for any public service." It is the Commission's opinion that the term "No judge" includes all judges of the State of Missouri including part-time judges and Municipal Judges.

The Commission has previously held that a judge of the State of Missouri could not both hold office and accept remuneration from other State employment. Opinion #8 stated:

"It is the opinion of the Commission that there is nothing unethical or any appearance of impropriety for the unopposed candidate to receive remuneration for teaching a college class prior to his swearing in.

However, Article V, Section 24 of the Missouri Constitution states: 'No judge or magistrate shall receive any other or additional compensation for any public service . . .' After the unopposed candidate is sworn in, he may not receive remuneration for teaching at a state college because this is 'compensation for any public service.' He may receive remuneration if the school in question is a private institution."

In conclusion it is the Commission's opinion that the Municipal Judge in question may not both hold office and receive additional remuneration from other state employment.

THE COMMISSION ON RETIREMENT,
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COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 63Issue:

May a municipal judge be appointed to represent an indigent in a criminal case?

Discussion:

American Bar Association informal Opinion #1286 reviewed this same issue in a related fact situation. That opinion dealt with a jurisdiction where municipal judges had the duty of determining probable cause in preliminary hearings of state charges in addition to their duties involving municipal ordinance violations. In deciding that municipal judges could not be appointed to represent criminal indigents the opinion stated:

"We think that the practice in question is precluded by Canon 5 of the Code of Judicial Conduct, which provides: 'A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.' Although the compliance schedule of this code reflects that a part-time judge may practice law, it clearly prohibits his acting 'as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.' Moreover, Canon 2(A) requires that a judge 'should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.' Because the prefatory paragraph of Canon 3 commands that the 'judicial duties of a judge take precedence over all his other activities' we conclude that he should not permit his law practice to intrude in the described circumstances upon his judicial duties.

In addition, from the view of the lawyer such conduct would be inconsistent with DR 5-101(A) of the Code of Professional Responsibility, which states:

'Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.'

Because the process for appointment of counsel for indigents does not ordinarily lend itself to an informed consent by the defendant and because of the inherent difficulties in procuring any binding consent on behalf of the state in the absence of express legislative or constitutional sanction (see Formal Opinion 306), we believe that the provision for consent to the representation would have no room for application in the instant case."

In Missouri, municipal judges do not handle preliminary hearings. However, facts that amount to a city ordinance violation are many times also a violation of state law. A municipal judge could conceivably be a judge in one trial and defense counsel in another involving the same facts. Additionally, the practice of appointing any judge as criminal defense counsel would erode public confidence in the integrity and impartiality of the judiciary in violation of Supreme Court Rule 2 Canon 2(A). The case of In Re Fullwood, 518 S.W.2d 22, 23 (Mo. 1975) held that municipal judges are subject to the jurisdiction of the Commission on Retirement, Removal and Discipline and the Code of Judicial Conduct. Accordingly, it is the opinion of the Commission on Retirement, Removal and Discipline that a municipal judge should not be appointed to represent criminal indigents.

Dated: January 6, 1982

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 81Issue:

May a municipal judge represent a criminal defendant when the charge arose out of events occurring outside the city limits? Also, may the municipal judge accept a civil case where there may be some question of a violation of a city ordinance but where no actual city charges have been filed?

Discussion:

Commission's Opinion #63 dealt with the issue of whether a municipal judge could be appointed to represent an indigent in a criminal case. That Opinion held:

"[F]acts that amount to a city ordinance violation are many times also a violation of state law. A municipal judge could conceivably be a judge in one trial and defense counsel in another involving the same facts. Additionally, the practice of appointing any judge as criminal defense counsel would erode public confidence in the integrity and impartiality of the judiciary in violation of Supreme Court Rule 2 Canon 2(A)."

Opinion #63 was not limited to criminal appointments occurring within the municipality in question. In the Commission's Opinion, any criminal appointment of a judge "would erode public confidence in the integrity and impartiality of the judiciary in violation of Supreme Court Rule 2 Canon 2(A).

The Commission has not yet covered the issue of whether the municipal judge can continue to practice criminal law either within or outside his municipality. The provisions of the Code of Judicial Conduct applicable to part-time municipal judges allows a judge to practice law but with the following restrictions:

"A part-time judge:... (2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto."

Additionally, Supreme Court Rule 2 Canon 5C(1) states:

"A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves."

Using the same reasoning as employed in Opinion #63, it is the Opinion of the Commission on Retirement, Removal and Discipline that a municipal judge practicing criminal law within his municipality could conceivably be a judge in one trial and defense counsel in another involving the same facts. Accordingly, the judge should not practice criminal law within his municipality and should withdraw from any criminal cases occurring within his municipality for which he had been retained prior to his swearing-in as a municipal judge.

A judge may, however, continue to practice criminal law on cases involving events occurring outside his municipality since there is no chance that the judge would be presiding in one trial and defense counsel in another involving the same facts.

It is the further opinion of the Commission on Retirement, Removal and Discipline that a municipal judge may accept a civil case where there is no pending issue of a violation of a city ordinance. The fact that a possibility exists that a charge could be filed involving the civil case does not preclude the municipal judge from handling the matter.

Dated: May 26, 1982

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 84AIssue:

May a judge accept compensation for services as an attorney for a county election board, a local public school district, or as a city attorney for another city? Secondly, may a judge accept compensation for services as a member of the following organizations:

1. County Port Authority and Industrial Development Commissions
2. City's Annexation Advisory Committee
3. Board of Directors of Southeast Missouri Legal Services Corporation (Legal Aid).

Third, may a judge serve as attorney for any of the above-stated organizations without compensation?

Discussion:

Article V, Section 20 of the Constitution of the State of Missouri provides:

"No judge shall receive any other or additional compensation for any public service."

In the opinion of the Commission on Retirement, Removal and Discipline, Article V, Section 20 of the Constitution means that no full-time or part-time judge shall accept payment from the State of Missouri for any public service other than the salary received as a judge. Thus, those agencies and commissions which receive funding from the State of Missouri cannot pay fees to any judge for any public service. This is true even if the judge receives no judicial salary from the State of Missouri.

As to whether a judge can serve on agencies and commissions without compensation depends on the judge's status as full or part time.

The full-time judge is governed by Supreme Court Rule 2 and 5G which state: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in His Official Activities."

"G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary."

In the Opinion of the Commission on Retirement, Removal and Discipline, all the public services listed in the Issue are concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. Accordingly, the full-time judge's participation in these public services violate Supreme Court Rule 2 Canon 2 and 5G.

A part-time judge is not required to comply with Canons 4, 5, 6, and 7. Accordingly, the only Canon which applies to the part-time judge's service without compensation on the commissions and agencies listed in the Issue is Canon 2 concerning the appearance of impropriety. A determination of whether service on a particul.

commission or agency creates the appearance of impropriety depends on the frequency with which the commission or agency appears before the judge. Also to be considered is whether the judge's service on the commission or agency will result in frequent disqualifications in accordance with Supreme Court Rule 2 Canon 3C.

In conclusion, all state and municipal judges shall not accept compensation for any public service from the State of Missouri other than their judicial salary. Full-time judges may not serve on the listed commissions and agencies without compensation as such service is in violation of Supreme Court Rule 2 Canon 2 and 5G. Part-time judges may serve with the listed commissions and agencies without compensation so long as such service does not create an appearance of impropriety.

Dated November 18, 1982

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 85Issue:

May a municipal judge be a member of a U. S. Congressman's reelection committee and may he attend a fund raiser for that congressman?

Discussion:

Under the section entitled "Compliance with the Code of Judicial Conduct" of Supreme Court Rule 2, it states:

"A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4, 5, 6 and 7;"

Accordingly, if the municipal judge in question is a part-time judge, he need not refrain from political activity as required by Supreme Court Rule 2 Canon 7. If, however, the municipal judge is a full-time judge, receiving compensation as a full-time judge, and is not permitted to practice law, then the municipal judge must comply with Supreme Court Rule 2 Canons 4, 5, 6 and 7. Accordingly, such a full-time municipal judge could not engage in political activities.

In conclusion, a part-time municipal judge may be a member of a congressman's reelection committee and attend a fund raiser for that congressman's benefit. A full-time municipal judge may not.

Dated August 24, 1982

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 125ISSUE:

Must a municipal judge disqualify himself when the lawyer/spouse of the judge's law partner appears in his court? Is the Commission's opinion the same if the appearance is made by another member of the lawyer/spouse's law firm?

DISCUSSION:

The commentary to Supreme Court Rule 2, Canon 3C(1)(d) states:

"The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'his impartiality might reasonably be questioned' under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3C(1)(d)(iii) may require his disqualification."

In the opinion of the Commission on Retirement, Removal and Discipline, the judge need not disqualify himself when his law partner's spouse or a member of the spouse's law firm appears before him unless the judge's impartiality might reasonably be questioned. Whether his impartiality might reasonably be questioned will depend on the facts and circumstances of each individual case. The commentary to Canon 3C(1)(d) refers to a lawyer-relative of the judge appearing before the judge. However, in the Commission's opinion, the same commentary applies to a situation where the attorney making the appearance is related to the law partner of the judge.

Dated: April 28, 1986

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 126ISSUE:

May a municipal judge allow his clerk who is subject to his direction and control to be employed by a court service company? The court service company runs a school for traffic offenders and attendance at the school is part of court ordered probation. The municipal court uses four different court service companies. Cases are divided equally among any qualified court service company that is in attendance on the night of court.

DISCUSSION:

Supreme Court Rule 2, Canon 3B(2) states:

"A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him."

In the opinion of the Commission, since the municipal judge has power of direction and control over his court clerk, he may not allow his clerk to be employed by a court service company if such employment might create the appearance of impropriety.

The controlling question is whether the court's use of a court service company which employs his clerk is the appearance of impropriety in violation of Supreme Court Rule 2, Canon 2:

"A judge should avoid impropriety and the appearance of impropriety in his official activities."

In the opinion of the Commission on Retirement, Removal and Discipline, the possibility of a traffic offender seeing the

clerk in the courtroom and then subsequently seeing the same clerk at the court service company could lead to the appearance of impropriety. Additionally, the potential for abuse and possible preferential treatment which is inherent in the clerk's dual employment makes this practice one which should be discouraged. As a result, the Commission's opinion is that the court clerk should not be allowed to be employed by the court service company.

Dated: June 24, 1986

BEFORE THE COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 141Issue:

May a part-time layman municipal judge assume the duties of a Municipal Building Commissioner pursuant to a municipal ordinance? The Building Commissioner presides over hearings to determine what action city government should take to abate dangerous or unsafe building conditions on private property. While it has never occurred, it is possible that a ruling of the Building Commissioner would result in the issuance of a misdemeanor charge. Typically no more than three such hearings occur per year and there is no extra compensation given to the municipal judge for assuming the duties of Building Commissioner.

Discussion:

Under that part of Supreme Court Rule 2 concerning compliance with the Code of Judicial Conduct, it is stated that a part-time need not comply with Canons 4, 5, 6, and 7.

However, Supreme Court Rule 2, Canon 1 states:

"A judge should uphold the integrity and independence of the judiciary".

Additionally, Canon 2 states:

"A judge should avoid impropriety and the appearance of impropriety in his official duties".

In the opinion of the Commission on Retirement, Removal and Discipline, having a municipal judge concurrently hold the office of Building Commissioner wherein he has the power to order compliance with various building codes would result in the appearance of impropriety and erode the judge's independence. This would be true even though the chance of a misdemeanor charge being issued is remote. Therefore, the judge should not hold the dual responsibility of municipal judge and building commissioner.

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 161Issue:

May a municipal judge rent office space from or to attorneys who appear before the judge?

Discussion:

Supreme Court Rule 2, Canon 3C(1)(d)(ii) states: .

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned..."

Additionally, Canon 5C(1) requires:

"A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves."

Previously in Opinion 143 the Commission reviewed the question of whether a judge could lease an office building at a fixed monthly rent to his former associate and then preside over a case involving that associate. The Commission determined that the facts in each case would have to be reviewed. The Commission stated:

"Consideration must be given to whether the payments for rent ... are at the fair market value in accordance with local market conditions. That is, any payment that is not within the fair market value would require the judge's disqualification."

In the opinion of the Commission on Retirement, Removal and Discipline so long as the rent paid or received is at a fair market value in accordance with local market conditions, there is nothing in the Code of Judicial Conduct which would prevent a judge from renting office space from or to attorneys who practice before the judge. However, the rental arrangement may still be considered a part of the grounds requiring disqualification in the event a more involved business relationship exists between the judge and the attorney. A rental arrangement at fair market value is not of itself sufficient to require a disqualification.

Dated: April 15, 1994

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 163Issue:

May a lawyer serve as Municipal Court Judge in the same municipality which retains the lawyer's partner as city attorney? The municipality in question also has a prosecuting attorney who handles ordinance and traffic violations. The city attorney does not appear in municipal court.

Discussion:

Supreme Court Rule 2, Canon 3(C) requires a judge to recuse "in a proceeding in which a judge's impartiality might reasonable be questioned." Additionally, Canon 2 requires a judge to avoid the appearance of impropriety in official activities.

The Commission notes that the city attorney may be involved in drafting ordinances which are then interpreted and applied by the municipal judge. The Commission perceives that for the same law office to be involved in both drafting and interpreting ordinances may create an appearance of impropriety. As a result, such dual employment is prohibited.

Dated: February 24, 1995

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 164Issue:

May a part-time municipal judge serve on the Regional Advisory Counsel for the State Department of Mental Health, Division of Alcohol and Drug Abuse? The judge's service would be involved in establishing policies and procedures for addressing substance abuse problems.

Discussion:

Under that part of supreme Court Rule 2 concerning compliance with the Code of Judicial Conduct, it is stated that a part-time judge need not comply with Canons 4, 5, 6, and 7. However, Supreme Court Rule 2, Canon 1, states:

"A judge should uphold the integrity and independence of the judiciary."

Additionally, Canon 2 states:

"A judge should avoid impropriety and the appearance of impropriety in his official duties."

In the opinion of the Commission on Retirement, Removal and Discipline, municipal judges are frequently called upon to direct individuals to participate in alcohol and drug rehabilitation programs as part of probation and plea resolutions. For a judge to be serving with the State advisory board which is setting up policies and procedures for alcohol and drug rehabilitation programs and also to require defendants to participate in such programs created a potential for a conflict of interests and is an appearance of impropriety. The judge should not so serve.

Dated: April 5, 1995.

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 168

Issue:

May a part-time municipal judge appear and represent a bail bonding company in circuit court or other municipalities' courts where the same bail bonding company posts bonds in the judge's municipal court?

Discussion:

Supreme Court Rule 2, Canon 2, requires that a judge should avoid the appearance of impropriety. In the opinion of the Commission on Retirement, Removal and Discipline, to allow a judge on one day to approve a bond or order a bond forfeited in municipal court and on the next day to appear in another court arguing on behalf of the same bonding company to set aside a bond forfeiture, creates the appearance of a conflict of interest and the appearance impropriety. It is the opinion of the Commission, therefore, that the judge should not represent as an attorney the same bonding company which writes bonds in his court.

Dated: November 21, 1996

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 172

Issue:

May a judge pursuant to a plea agreement impose, as a condition of probation, a requirement that the defendant pay a sum to a specified charity, to the county treasury or to a "county crime reduction fund." A "county crime reduction fund" is a fund established by county ordinance to collect and distribute such payments to law enforcement agencies.

Discussion:

In the case Matter of Storie, 574 SW2d 369, the Supreme Court determined that court consent to and participation in the operation of a "library fund" into which criminal defendants made contributions as part of plea bargains had the appearance to the public of a "payoff" and was violative of the Code of Judicial Conduct.

Article IX, Section 7 of the Missouri constitution, provides: "...the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other monies coming into said funds shall be distributed annually to the schools of the several counties according to law."

In the opinion of the Commission on Retirement, Removal and Discipline, absent a state statute or constitutional provision to the contrary, a judge's acquiescence in a plea bargain which would divert monies paid as a consequence of violations of the law from schools and instead require the monies to be paid to charities or funds set up by municipal or county ordinance is violative of the Code of Judicial Conduct in that it creates an appearance of impropriety and indicates the Judge has not been faithful to the law. The existence of a municipal or county ordinance providing a receptacle for payments in lieu of fines does not change the constitutional directive to distribute monies collected as fines to local schools.

The judge should not impose as a condition of probation payments to the county treasury, a county crime reduction fund or specified charity absent a state statute or constitutional provision authorizing such payments.

Dated: September 3, 1998

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 173

Issue:

- A. Does Opinion 172 apply to part-time or full-time municipal court judges?
- B. Does Opinion 172 apply to conditions of probation involving the payment of restitution to victims or the performance of free work for public or charitable purposes?
- C. Does Opinion 172 apply in state or municipal cases involving a suspended imposition of sentence?

Discussion:

In Opinion 172 the Commission determined that a judge "should not impose as a condition of probation payments to the county treasury, a county crime reduction fund or a specified charity absent a state statute or constitutional provision authorizing such payments". As authority, the Commission cited Article IX, Section 7, of the Constitution and the case Matter of Storie, 574 SW2d 369 (Mo. banc 1978).

The issue of whether a judge can impose conditions of probation that require payments into charitable organizations or some type of county fund has been examined in several jurisdictions. The Minnesota Board of Judicial Standards issued a 1984 opinion holding that a judge in criminal case may not order a defendant to pay money to a charity or charitable institution either directly or as part of a plea agreement. In the case In the Matter of Davis, 946 Pacific 2d 1033 Nevada (1997) a judge was disciplined in part for directing or suggesting to persons appearing in the judge's court who had been found guilty to contribute money to certain charities in lieu of paying fines to the city thereby diverting money from the city treasury. In addition, there is following language from the opinions of state judicial performance commissions:

"A judge may not impose sentences requiring criminal defendants to pay monies that are allocated to educational, religious, charitable, fraternal, or civic activities, unless the sentencing practice has been authorized by law... A sentencing program by which a judge requires parties to pay monies which are allocated to charitable/civic purposes is akin to a 'solicitation' by the judge for that charitable/civic activity and contravenes MCJC 5B. A sentencing program, no matter how laudable the goals, that uses the power of the judicial office to solicit monies is conduct prejudicial to the administration of justice." Michigan Advisory Opinion JI-55 (1992).

* * * *

"A sentencing judge may not give offenders the option of performing a designated number of hours of community service work or making a monetary contribution to a charity designated by the judge....

Underlying the prohibition against judicial solicitation is the notion that it is not ordinarily possible to solicit without raising the suspicion that the judge is using the power and prestige of judicial office to persuade or coerce others to contribute. No matter how well intentioned, the work of solicitation for charitable purposes is better left to persons other than those who occupy the bench. The rule is not limited to solicitation for charity but applies equally to civil, ecclesiastical and other philanthropic enterprises.

If judges are forbidden to solicit for charity, clearly judges cannot direct contributions by requesting or requiring offenders to donate contribution in lieu of fine or jail time to charities designated by the judge. Just because the option of making cash contributions to the court's charity in lieu of performing a certain number of hours of community service work is in addition to the more traditional sentences of time and fine does not make the sentencing practice any more acceptable. The sentencing judge is left open to the accusation that a particular community service alternative is intentionally more burdensome than required in order to encourage monetary contributions to the judge's charity. The judicial imposition of dollars for hours also discriminates in favor of those more affluent offenders who have the means to buy out of community service work....

We are unable to find any authority in law which allows the sentencing practices described." Michigan Advisory Opinion JI-48 (1992).

* * * *

In finding that a judge may not require defendants in a criminal case to pay certain sums of money directly to a charity named by the judge as part of the sentence imposed, the Florida Committee on Standards of Conduct Governing Judges held:

"Canon 5B prescribed the charitable activities that a judge may undertake and precludes a judge from soliciting funds or permitting the use of the prestige of his office for that purpose. One member also notes the involvement of the general prohibition of Canon 2B and writes:

I perceive a potential violation of Canon 2B, Code of Judicial Conduct. The power to control the pocketbook of another person so as to cause him to

taken [sic] that which is his own and give it to another is an awesome power; it is tantamount to the authority to tax. If a judge exercises this power in such a way as to convey the impression that he is advancing the private interest of a particular charity, he may be improperly lending the prestige of his office to that charity. This may reflect adversely upon the impartiality and integrity of the judge.

Both Canon 2B and Canon 5B condemn the use by a judge of the prestige of his office for the advancement of private interests, although Canon 5B is more specifically directed toward charitable private interests. In this case, it is not the prestige alone which is being used but the power of the judicial office in imposing a charitable contribution requirement as part of a sentence, and the infringement of the Canons is clear." Florida Advisory Opinion 84-11.

* * * *

"In the present case, criminal defendants, as part of a plea agreement, contribute to a designated fund. Ostensibly, in return, they are allowed to enter an agreement with the State; the contribution then goes to further the efforts of the office which entered the agreement on behalf of the State. This is not dissimilar to the practice examined by the Supreme Court of Missouri in a case involving contributions by criminal defendants to a "Library Fund." Matter of Storie, 574 SW2d 369 (Mo. 1978). The Court concluded that even though there was no evil intent on the part of the judge, 'the practical effect to the public is that of a "pay-off".' The judge was temporarily suspended from office. The members of the Commission are of the opinion that the above described victim fund program does suggest decisional favor predicated on financial contribution. Accordingly, the Commission is of the further opinion that a judge would violate Canon 2 of the Code of Judicial Conduct by permitting plea agreements of this nature." Indiana Judicial Nominating Commission, Indiana Commission on Judicial Qualifications (December 16, 1986).

* * * *

In the opinion of the Commission there are three grounds for prohibiting the imposition of conditions of probation which would require payments into civic or charitable organizations:

1. As outlined in Opinion 172, Article IX, Section 7, of the Constitution of the State of Missouri requires the proceeds of penalties for any breach of the penal laws of the state to be paid to schools;

2. The appearance that, by imposing such conditions of probation, the judge is involved in fundraising in violation of Canon 4;
3. The appearance that a decisional favor is predicated on a financial contribution as in the case Matter of Storie, in violation of Canon 2.

In response to the three specific issues the Commission's opinion is as follows:

A. Municipal judges, whether full-time or part-time, do not handle state cases and as such fine money is disbursed according to the appropriate municipal ordinance. Article IX, Section 7, of the Constitution of the State of Missouri has no application to municipal judges. Secondly, part-time municipal judges are not bound by the proscriptions of Canon 4, and as such are allowed to engage in fund raising. Full-time municipal judges, on the other hand, are bound by Canon 4, and thus any condition of probation requiring payment to a civic or charitable organization would be violative of the Code of Judicial Conduct unless such payments were authorized by municipal ordinance. Finally, both part-time and full-time municipal judges are bound by the proscriptions of Canon 2, which prohibits creating the appearance of a "payoff" as found in the case Matter of Storie. Accordingly, conditions of probation requiring a payment to a civic or charitable institution should not be imposed by either the full-time or part-time municipal judge unless authorized by a statute or ordinance.

B. Section 559.021 provides that a judge may impose as a condition of probation:

- "(1) restitution to the victim or any dependent of the victim, in an amount to be determined by the judge; and
- (2) the performance of a designated amount of free work for a public or charitable purpose or purposes, as determined by the judge."

In addition, VAMS Section 559.021(2) in pertinent part provides: "...the court may order such conditions as the court believes will serve to compensate the victim, any dependent of the victim, or society." The Commission does not interpret the words "or society" to override the language of Article IX, Section 7, of the Constitution of the State of Missouri or the prohibitions in Supreme Court Rule 2, Canons 2 and 4, against fund raising and creating the appearance of impropriety.¹

On the other hand, nothing in Opinion 172 or this Opinion 173 is meant to prohibit the conditions of probation specifically authorized by VAMS Sections 559.021(1) and (2). That is, a judge may continue to order restitution to the victim and the performance of free work for a public or charitable purpose.

C. Since cases disposed of through a suspended imposition of sentence involve a finding of guilt and a penalty for the breach of the penal laws of the State, Article IX, Section 7 of the Constitution would seem to apply. In addition, the issues of whether a judge is involved in

fund raising applies to full-time judges and all judges, full-time and part-time, are subject to the proscriptions of Canon 2. Thus, a suspended imposition of sentence is subject to Opinion 172.

Dated: March 2, 1999

¹ Attorney General Opinion 42-88 which allowed a judge to impose as a condition of probation payment of money to a county fund created for law enforcement purposes was withdrawn by the Attorney General on September 24, 1998.

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION #176

Issue:

May a judge accept a plea bargain if the judge knows that a precondition to the recommendation is payment of money to a specified charity, the county treasury or a "county crime reduction fund"? The judge is aware that the payment has been made and the reason for the recommendation but is not asked to make payment part of the sentence or condition of probation.

Discussion:

The Commission has previously reviewed the issue of plea agreements involving payments to charities or government funds not authorized by statute or ordinance in Opinion 172 and Opinion 173. The issue here is whether the judge can avoid the application of those opinions so long as the payment is made to the charity or fund with the judge's knowledge but without the judge's approval or involvement.

Opinion 172 dealt with a State judge's approval of a plea agreement involving payments into the "county crime reduction fund" and held:

"In the opinion of the Commission on Retirement, Removal and Discipline, absent a state statute or constitutional provision to the contrary, a judge's acquiescence in a plea agreement which would divert monies paid as a consequence of violations of the law from schools and instead require the monies to be paid to charity or funds set up by municipal or county ordinance is violative of the Code of Judicial Conduct in that it creates an appearance of impropriety and indicates the judge has not been faithful to the law."

Opinion 173 expanded the application of Opinion 172 to include part-time or full-time municipal judges. Both Opinion 172 and Opinion 173 refer to the proscriptions of Canon 2 "which prohibits creating the appearance of a 'payoff' as found in the case *Matter of Storie*" (Opinion 173 citing *Matter of Storie*, 574 SW2d 369 (Mo. banc 1978)).

Even though the judge does not impose a charitable or civic payment as a part of the sentence or condition of probation, when the judge knows such a payment is a precondition to receiving the recommendation, the appearance of a "payoff" remains. The judge has the obligation to review the plea agreement and exercise discretion in a manner so as not to create the appearance of a "payoff." The judge should not approve such a plea bargain absent an ordinance, statute or constitutional provision authorizing such payments.

Dated: August 25, 2000

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

OPINION 180

Issue:

May a judge allow a condition of probation or of a plea bargain requiring donations to a county school fund in lieu of a fine?

Discussion:

The Commission has issued a series of Opinions (172, 173 and 176) dealing with the questions pertaining to the imposition of conditions of probation requiring donations in lieu of fines.

In Opinion 176 concerning the issue of whether a judge can allow such payment if it is a precondition to a plea bargain, the Commission held:

"Even though the judge does not impose a charitable or civic payment as part of a sentence or condition of probation, when the judge knows such a payment is a pre-condition to receiving the recommendation, the appearance of a 'payoff' remains. The judge has the obligation to review the plea agreement and exercise discretion in a manner so as not to create the appearance of a 'payoff'. The judge should not approve such a plea bargain absent an ordinance, statute or constitutional provision authorizing such payments."

The question now before the Commission is whether the appearance of a "payoff" is avoided by making the donation to the same fund (the county school fund) that receives fine money pursuant to Article IX, Section 7 of the Missouri Constitution. The pertinent language of Article IX, Section 7 of the Missouri Constitution provides that ... the clear proceeds of all penalties, forfeitures and fines... shall be distributed to the county school fund. The Commission notes that there is no specific mention in Article V, Section 7 of payments made as a condition of probation or a plea agreement, and thus, the Commission finds no specific constitutional provision authorizing such payments.

In Opinion 173, the Commission reviewed VAMS Section 559.021(2) to determine whether that statute authorized conditions of probation requiring payments to the county treasury, county crime reduction fund or a specified charity absent a state or constitutional provision authorizing such payments. The Commission stated:

"In addition, VAMS Section 559.021(2) in pertinent part provides:
'...the court may order such conditions as the court believes will serve to

compensate the victim, any dependent of the victim, or society.' The Commission does not interpret the words 'or society' to override the language of Article IX, Section 7, of the Constitution of the State of Missouri or the prohibitions in Supreme Court Rule 2, Canons 2 and 4, against fund raising and creating the appearance of impropriety."

It is the Commission's opinion that even though a condition of probation or a plea agreement requires that a payment go to the same fund (county school fund) as required by the Constitution for fines, there is still the appearance of a "payoff" and the appearance of impropriety. Such conditions of probation or a plea agreement should not be allowed unless specifically authorized by a municipal ordinance (in the case of municipal charges) or by a state statute or constitution in state charges.

Dated: February 20, 2002